STATE OF MICHIGAN

COURT OF APPEALS

CANFIELD FUNDING LLC, d/b/a MILLENNIUM FUNDING,

Plaintiff/Counter-Defendant/Appellant,

v

CEO CAPITAL GROUP LLC,

Defendant/Counter-Plaintiff/Third Party Plaintiff/Appellee,

and

R&K IRRIGATION INC., RAYMOND A. LOWELL, and KIMBERLY L. LOWELL,

Third Party Defendants.

UNPUBLISHED
March 17, 2011

No. 295869
Oakland Circuit Court
LC No. 2008-095715-CK

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff/Counter-Defendant/Appellant Canfield Funding LLC, (plaintiff) appeals by leave granted the trial court's opinion and order granting partial summary disposition in favor of Defendant/Counter-Plaintiff/Appellee CEO Capital Group, LLC (defendant). Because the circuit court erred when it dismissed plaintiff's claims based on the estoppel letter we vacate and remand, and, because plaintiff was entitled to summary disposition of defendant's counterclaim for tortious interference with a business relationship, we reverse.

Plaintiff, a financial consulting company, entered into a factoring agreement with third party defendant R&K Irrigation, Inc., a lawn sprinkler service and grounds maintenance company, on July 2, 2008. Plaintiff agreed to pay R&K Irrigation cash upfront in exchange for the rights to collect certain accounts receivables owed to R&K Irrigation. Third party defendants

Raymond and Kimberly Lowell owned R&K Irrigation.[1] Defendant is a construction company and owed a portion of the accounts receivable at issue to R&K Irrigation for irrigation work contracted to be performed on defendant's construction projects. Specifically, defendant owed R&K Irrigation $2,925 for work pursuant to one invoice and $23,500 under a second invoice.

Before purchasing the particular accounts receivable owed by defendant to R&K Irrigation, plaintiff sent defendant two separate "Estoppel Letters" asking defendant to execute each of the letters verifying the amount of the two invoices defendant owed to R&K Irrigation. The first letter is dated July 24, 2008 and references R&K Irrigation Invoice #92665, date 7/17/2008 amount $2,925, and the second letter is dated July 30, 2008 and referenced R&K Irrigation Invoice #92688, date 7/28/2008 amount $23,500. Both estoppel letters plaintiff sent to defendant contain the following language:

> The undersigned acknowledges, represents and warrants to MILLENNIUM FUNDING [plaintiff] that the above invoice amount(s) are correct ***and now owing***; that there will be no more than a 20% offset(s) against the above invoiced amount(s); and that there will be no claims against the funds paid. Please note that you are not waiving any claims you may have against the vendor [R&K Irrigation], but are merely ***agreeing not to assert those claims against us*** [plaintiff]. [Emphasis added.]

Defendant's president and sole shareholder Cathy Omilian signed both of the estoppel letters, the first on July 24, 2008, and the second is undated. Omilian returned both letters to plaintiff.

R&K Irrigation performed the work under the first invoice for defendant described on Invoice #92665 as "M-24 & Silverbell, Irrigation Repairs, 15 Rotors @ $45.00, 1500' 1" Poly Pipe @ $1.00 per ft", and defendant paid the $2,925 amount owed to plaintiff. However, there is no dispute that R&K Irrigation did not perform the work contracted for under the second invoice for $23,500. That work was described on Invoice #92688 as follows, "Removed & Disposed Of All Debris From Site, Site Prepped & Ready For Restoration." As a result, defendant never paid the $23,500 to plaintiff.

Plaintiff sued defendant to collect the $23,500 owed, alleging several counts including: account stated, estoppel, breach of contract, fraudulent misrepresentation, and innocent/negligent misrepresentation. Plaintiff asserted that the estoppel letters signed by defendant's president created a contractual obligation to pay the amount stated. Defendant asserted that Omilian signed the letters merely to acknowledge that a contract existed between defendant and R&K Irrigation, and did so in order that R&K Irrigation could finish the job it was contracted to perform. Defendant filed a counterclaim against plaintiff for tortious interference with business relations and filed third party claims against R&K Irrigation and the Lowells.

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[1] According to plaintiff's brief on appeal, Raymond Lowell has since passed away, Kimberly Lowell has filed for bankruptcy, and R&K Irrigation is now out of business.

Plaintiff and defendant CEO filed cross-motions for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10). The circuit court considered the motions on the briefs alone and signed its written opinion and order on October 14, 2009. The circuit court quoted the waiver language from the estoppel letter and noted that defendant expressly did not waive its defenses against R&K Irrigation. The circuit court found that plaintiff could only recover as an assignee of R&K Irrigation and possessed only those rights which R&K Irrigation could enforce. All the defenses which defendant could raise against R&K Irrigation could be raised against plaintiff. There was no dispute that R&K Irrigation failed to perform the work under the second invoice, so there was no genuine issue of material fact that R&K Irrigation breached the contract and could not successfully sue for payment under the contract.

The circuit court rejected plaintiff's argument that defendant's execution of the estoppel letter effectively waived its defenses against plaintiff's claim, stating as follows:

> Plaintiff Millennium contends that it had CEO Capital execute valid waivers of defenses asserted by Millennium (such as counter breach of contract by R&K Irrigation). Millennium suggests that CEO Capital owes Millennium $23,000 on the second invoice as the assignee of R&K and CEO Capital open account. However, to constitute a "waiver" of a defense, there must be an intentional relinquishment of a known right with both knowledge of its existence and intention to relinquish it. *American Locomotive Co v Chemical Research Corp*, 171 F2d 115 [(CA 6 1948)]. Here, at the time CEO Capital signed the alleged "waiver" letters it did not know of any rights and/or defenses it would have against R&K such as the fact that R&K did not perform any of the work requested in the second invoice.
>
> Likewise, when CEO Capital signed the letters from Millennium it did not intend to relinquish all the rights it had nor did it intend to relinquish its right to set-off and/or assert a claim for breach of contract for failure to perform. CEO Capital argues that it has a large right at stake here, namely the right to invoke its defense to payment for failure to perform work. Whether a particular right is waivable is dependent on the right at stake. *People v Carter*, 462 Mich 206 [; 612 NW2d 144] (2000). The right at stake here is the right to defend against a breach of contract claim where one party failed to perform the work requested. In this case there is no dispute that the work was never performed. Here, CEO Capital argues that Millennium should not be able to collect monies owed from CEO for work that was never completed by R&K and for which CEO Capital was required to pay another contractor in order to complete. *Id*. This court agrees.

The circuit court granted defendant's motion for summary disposition of all of plaintiff's claims and denied plaintiff's motion for summary disposition. The court's opinion provided no explanation for its denial of plaintiff's motion for summary disposition of defendant's counterclaim for tortious interference.

Plaintiff moved for reconsideration, raising the same arguments raised in this appeal. The circuit court denied that motion in a lengthy opinion and order signed December 15, 2009. The circuit court's December 15, 2009 order reiterated its holding that since "R&K Irrigation

failed to perform on the underlying contract and as such, CEO Capital was not required to pay." The circuit court found no genuine issue of material fact existed which would support plaintiff's promissory estoppel argument, explaining as follows:

> In its opinion and order of October 14, 2009, the court made a finding of fact that at the time that the Estoppel Letter was signed by CEO Capital, R&K Irrigation had not started the work on the underlying contract. As is undisputed, R&K never performed the work. Thus, it is apparent that there is no dispute that CEO Capital was unaware of the true facts in this matter and, thus, the element (awareness of the true facts by the party to be estopped) could not be met.

The circuit court also found no reason not to grant summary disposition of plaintiff's misrepresentation claims, writing:

> A claim for misrepresentation/innocent misrepresentation requires materially false representation and/or suppression of the truth made with knowledge of its falsity. *Kassab v Mich Basic Property Ins Assn*, 441 Mich 433[; 491 NW2d 545] (1992). The court held in the October 14, 2009 opinion and order that CEO Capital was not aware of the true facts at the time the Estoppel Letters were signed and thus it cannot be held liable for misrepresentation or innocent misrepresentation. *Id*. Thus the Court explicitly grants summary disposition with regard to [plaintiff's] claims for fraudulent misrepresentation at Count IV and negligent misrepresentation at Count V.

The circuit court upheld its denial of plaintiff's motion for summary disposition of defendant's counterclaim for tortious interference, finding that questions of fact remained regarding whether plaintiff's agents made disparaging remarks to third party customers about defendant CEO Capital. According to the court, defendant's president Cathy Omilian testified at deposition that plaintiff called defendant's customers and told them that defendant was not paying its bills and to avoid business dealings with defendant. Defendant's manager Ron Omilian testified that defendant's customers had been contacted by plaintiff's agent and told that defendant had a history of not paying its subcontractors. The circuit court noted that making disparaging remarks to existing customers or clients amounts to tortious interference with a business relationship. Plaintiff now appeals by leave granted.[2]

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and

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[2] Defendant has not answered.

other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). The trial court's task in reviewing the motion entails consideration of the record evidence and all reasonable inferences arising from that evidence. *Skinner*, 445 Mich at 161. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition brought under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court is not permitted to assess credibility, to weigh the evidence, or to determine facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

"The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza*, LLC, 273 Mich App 449, 452; 733 NW2d 766 (2006). Estoppel, being an equitable issue, is also reviewed de novo. *AFSCME Int'l Union v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005). Unambiguous contracts must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Absent ambiguity, contractual interpretation begins and ends with the actual words of a written agreement. See *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). The purpose of interpreting a contract is to determine and enforce the intent of the parties as expressed in the contract. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 63 (2000). Unambiguous contract language should be enforced according to the plain and ordinary meaning of its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2004); *Daimler Chrysler v Wesco Distribution, Inc*, 281 Mich App 240, 248; 760 NW2d 828 (2008).

The plain language of the July 30, 2008 estoppel letter referencing R&K Irrigation Invoice #92688, in the amount of $23,500 states that defendant confirmed the accuracy of the stated amounts defendant owed to R&K Irrigation, the amounts were due and owing, and agreed to pay those amounts to plaintiff. While it appears the circuit court read this language as merely an assignment of the R&K Irrigation's right to payment on the account, the letter specifically and explicitly states that defendant agrees "that there will be no claims against the funds paid" and that defendant agrees not to assert claims it may have against R&K Irrigation against plaintiff. The plain terms of the contract state that defendant waives any offsets it could otherwise assert against plaintiff even if it could raise those claims against R&K Irrigation.

The circuit court's holding that defendant could not waive the defense of non-performance by R&K Irrigation because R&K Irrigation had not yet performed the agreed-to work is contrary to the express language of the estoppel letter. The estoppel letter states that defendant "acknowledges, represents, and warrants" to plaintiff that the invoice amount was correct "and now owing." Nothing in the record supports the circuit court's conclusion that defendant "was unaware of the true facts in this matter." To the contrary, the record contains crucial documentary evidence belying this conclusion. R&K Irrigation invoiced defendant on July 28, 2008 the amount of $23,500 for the following service, "Removed & Disposed Of All Debris From Site, Site Prepped & Ready For Restoration" on Invoice #92688. The invoice also

states that the amount of the invoice was "Due on receipt." As the general contractor that retained R&K Irrigation's services, defendant knew or should have known that R&K Irrigation had yet to perform the contracted work at the time it was invoiced despite the fact that R&K Irrigation stated the $23,500 was due and owing and despite the fact that the description of services on the invoice was in the past tense and described work that seemingly had already been performed. Defendant so knew of the possibility that R&K Irrigation might not perform the work when it executed the estoppel letter of July 30, 2008 at least two days *after* receiving Invoice #92688. Regardless of knowing of the possibility that R&K Irrigation had not yet, and still could fail to perform the contracted work, defendant expressly agreed not to assert any claims against the amounts owed against plaintiff. Defendant knew of its right not to pay R&K Irrigation in the event it failed to do the work and intentionally waived that right with regard to plaintiff by signing and returning the estoppel letter. For these reasons, we conclude that the executed July 30, 2008 estoppel letter was a valid contract that by its terms waived defendant's right to assert claims and defenses against plaintiff.

Plaintiff alternatively contends that it is entitled to recovery based on its theory of promissory estoppel and misrepresentation. "Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions." *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 549 n 4; 619 NW2d 66 (2000). Promissory estoppel requires a showing of: 1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Ardt v Titan Insurance Co*, 233 Mich App 685, 692; 593 NW2d 215 (1999).

The record here shows that defendant promised by way of the July 30. 2008 estoppel letter that the $23,500 invoice amount stated in R&K Irrigation's accounts receivable was correct "and now owing." Defendant should have expected plaintiff to rely on this statement by paying R&K Irrigation for the $23,500 account receivable owed by defendant, and plaintiff did in fact rely on defendant's statement by buying that account receivable from R&K Irrigation. Any concern about work not having started or doubt about R&K Irrigation's performance of the work described on Invoice #92688 would have been dissipated when defendant, at least two days after receiving the invoice agreed by virtue of its execution of the estoppel letter that R&K Irrigation's accounts receivable with regard to Invoice #92688 was correct "and now owing." Defendant has presented no reason why plaintiff was not entitled to rely on defendant's promise. Since defendant promised that the amount of the invoice was accurate and owed to R&K Irrigation, it is estopped from arguing after the fact that it did not owe the money since the work was never performed. While this may seem like a harsh result, we must point out that, at all times, defendant knew of its right not to pay R&K Irrigation in the event it failed to do the work but affirmatively chose to waive that right with regard to plaintiff by executing the estoppel letter.

Also, as we mentioned above, at the time it executed plaintiff's estoppel letter defendant represented that the invoice amount was "due and owing" despite the fact that it knew or should have known that the work had yet to be performed by R&K Irrigation. This was a material misstatement of fact which induced plaintiff's payment to R&K Irrigation and so could provide the basis for a fraud or misrepresentation claim against defendant. *Clement-Rowe v Michigan Healthcare Corp*, 212 Mich App 503, 508: 538 NW2d 20 (1995).

Plaintiff has also shown that it was entitled to summary disposition of defendant's counterclaim for tortious interference with a business relationship against plaintiff. The specific allegations are set forth in its cross, counter, and third-party complaint as follows:

> 18. . . . Millenium knew of CEO's business relationships and expectancies with customers on projects that R&K was to or did perform irrigation services pursuant to the parties contracts.
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> ***
>
> 20. . . . Millennium intentionally and improperly interfered with CEO's business relationships and expectancies when [it] contacted customers, making false and defamatory statements including false indication that CEO was improperly refusing to pay R&K.
>
> 21. [Millenium's] intentional and wrongful conduct resulted in breach and disruption of CEO's business relationships and expectancies, resulting in substantial lost profits, damage to its reputation and costs.

Defendant's tortious interference with business relations claim fails because defendant cannot meet the elements required to sustain such a claim. The elements are as follows:

> (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. [*Health Call v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 90; 706 NW2d 843 (2005).]

To fulfill the third element, intentional interference inducing or causing a breach of a business relationship, a plaintiff must demonstrate that the defendant acted both intentionally and either improperly or without justification. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 498; 421 NW2d 213 (1988). To establish that a defendant's conduct lacked justification and showed malice, "the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996).

Defendant offers little, if any, evidence to support its argument. The circuit court relied on deposition testimony from Cathy Omilian and Ron Omilian that plaintiff's agents called defendant's customers and made disparaging statements about it. Indeed, plaintiff has provided only Cathy Omilian's deposition testimony and an affidavit from Ron Omilian purporting to support these assertions. But the affidavit and deposition testimony are insufficient. Cathy Omilian's relevant deposition testimony is as follows:

> *Q*. When you had all these conversations that you can't recall who they told you and what they told you and where you were and when it was, did anybody ever

tell you what the person from Millennium Funding who nobody can remember was, what that person said about C.E.O. Capital Group?

***

A. Rephrase it, please.

Q. I'll rephrase it. We've already established, you don't recall when the conversation took place?

A. I don't.

Q. You don't recall who it was you had the conversation with, you don't recall whether they told you it was a particular person at Millennium Funding or not, you don't recall who it was that the person from Millennium Funding contacted; is all that correct?

A. Yes.

Q. Do you recall the substance of what this unknown person from Millennium Funding said to this unknown person at your customer at this unknown time and this unknown place, do you remember what they said?

A. I'm not sure.

Q. You're not sure whether you recall or not?

A. I'm not sure whether I recall it exactly.

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Q. What was allegedly said by Millennium Funding?

A. That we weren't paying our bills.

Q. Anything else?

A. Not to do work for us as far as what I remember.

Q. Not to do work?

A. Not to have relationships with C.E.O.

Q. Somebody from Millennium funding told somebody not to have relationships?

A. Yes. Just basically bad-mouthing our company.

Q. Well, as far as the bad-mouthing goes, you'll admit, will you not, that C.E.O. did not pay the two invoices that corresponded to the letters that you signed, correct?

A. Correct.

Q. As far as telling somebody not to have a relationship with C.E.O., who was told not to have a relationship with C.E.O.?

A. I'm not sure.

Q. Did anybody, after this time, whenever it may have been, cancel any contracts with C.E.O.?

A. I'm not sure.

Q. You're not sure?

A. I'm not sure.

Q. Do you have any reason to believe that anyone who heard these statements from Millennium Funding stopped doing business with C.E.O. capital Group?

A. Are you asking me specifically if anyone stopped?

Q. Do you have any reason to believe that on the basis of these statements that you are saying were made by Millennium Funding, anybody stopped doing business with C.E.O. Capital Group?

A. I'm not sure. I'm sure it wasn't good for our name.

Q. Ma'am, that's not my question.

A. Then I guess I don't understand your question.

Q. Sitting here light now, do you have any facts in your head that lead you to believe that any of your customers heard from Millennium funding and decided not to do business with C.E.O. Capital Group because of that?

A. I believe that.

Q. What facts do you base that on? Who stopped doing business with you, first of all?

A. I can't recall right now.

Q. Did they cancel a contract that you had?

A. I'm not sure.

> *Q*. How many contracts - how many projects has C.E.O. Capital Group worked on in the last eleven months?
>
> *A*. Several, many.
>
> *Q*. How many are many?
>
> *A*. Between zero to 20. I'm not sure.

Ron Omilian's relevant statements in his affidavit are as follows:

> 18. In late-September and October 2008, I was advised by several CEO customers, including agents of the City of South Lyon, and CEO material suppliers, including Rocks and Roots, that Raymond A. Lowell ("Lowell") made telephone calls to advise CEO customers that CEO had engaged in illegal business practices, that they should not continue to do business with CEO and that CEO had a history of not paying its subcontractors.
>
> 19. CEO clients also told me that Lowell had contacted them to advise of ongoing "collection efforts" against CEO by Millennium. Raymond A. Lowell even told MDOT representatives that CEO was going to be sued by Millennium for failure to pay its subcontractors.
>
> 20. On information and belief, Lowell was acting as an agent for Millennium at the time that he contacted CEO's customers and clients since, on the dates of his improper contacts, Lowell had no interest in or right to the proceeds that are at issue in this matter.
>
> 21. CEO works for state and federal agencies, including several municipalities and MDOT, which impose requirements regarding the timely payment of suppliers and subcontractors. CEO has thereby been severely and irreparably harmed as a result of the Defendants' tortious conduct including loss of business opportunities and damage to its reputation.

This is the universe of evidence on which defendant relies. The testimony is insufficient to create a question of fact because it is rife with hearsay by unidentified sources and third-party contacts. A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition brought under MCR 2.116(C)(10). *Maiden*, 461 Mich at 121; MCR 2.116(G)(6). Moreover, there is no specific fact-based evidence demonstrating all or even any of the elements of tortious interference with a business relationship on this record. *Health Call*, 268 Mich App at 90. Even if we were to consider Ron Omilian's affidavit statements without regard to hearsay considerations, they are not enough to establish all of the elements required for a successful tortious interference with a business relationship claim because they do not establish that a termination of a relationship or expectancy actually occurred, with what individual or company, and any actual damages as a result of the disruption to defendant. *Id*. Mere promises to present more specific evidence to establish the elements later is not enough. Without actual evidence to support a genuine issue of material fact that plaintiff

tortiously interfered with defendant's business relationships, defendant has not offered enough evidence to preclude summary disposition on its counterclaim.

We vacate and remand to the trial court for it to grant summary disposition in favor of plaintiff on its claims, subject to the trial court's determination of the applicability of defendant's entitlement to no more than a 20% offset pursuant to the terms of the estoppel letter. We reverse the trial court's denial of summary disposition in favor of plaintiff on defendant's counterclaim for tortious interference with a business relationship. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio